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Federal Appellate Review of the Grant or Denial of Class Action Status

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FEDERAL APPELLATE REVIEW OF THE GRANT OR DENIAL OF CLASS ACTION STATUS

INTRODUCTION: THE CLASS ACTION

Historically, the class action was developed as a mechanism to vindicate in one suit the claims of a group of individuals with common grievances.[1] Three fundamental policy considerations underlie the class action concept: reducing the burden on the courts; eliminating the risk to parties of inconsistent determinations by different courts relating to the same issue; and most importantly, providing "a vehicle for redressing small injuries to a large number of persons."[2] As such, the class action has become a "semi-public remedy,"[3] and can be characterized as a strange amalgam of administrative and private suits.[4]

Prior to 1966, the party who sought class action status was faced with a confused, and confusing, procedure.[5] In 1966, therefore, Con-

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[1] *See,* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 505 (1969); Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, (1941).

[2] Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 504 (1969). *See* Kaplan, *A Prefatory Note, id.* at 497:

> The reform of Rule 23 was intended . . . to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. . . . The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.

[3] Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684, 717 (1974).

[4] *See* Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968).

[5] For a critical analysis of the original rule 23, together with proposals that are embodied in the present rule, see Keefe, Levy & Donovan, *Lee Defeats Ben Hur,* 33 CORNELL L. Q. 327 (1948). *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)* 81 HARV. L. REV. 356, 375-400 (1967) [hereinafter Kaplan, *1966 Amendments*]. The class action was the antidote to an acknowledged lack of a means to redress otherwise unremediable wrongs, a concept originally contained in Equity Rule 38, 226 U.S. 659 (1912). See Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969). Yet Equity Rule 38 was vague, providing little more than a principle. The response to this amorphous rule was one of overcompensation; the original rule 23 attempted a bewildering delineation of types of action and comcomitant types of classes. FED. R. CIV. P. 23 (1940). Thus if the asserted right was "joint," "common," or "secondary" the action was certified as "true." If the right was "several," and the claim involved specific property, the action was "hybrid." If the right was "several," with common questions of law or fact affecting the right, and if common relief was sought, the action was "spurious." In a "spurious" action the judgment was binding only on those members before the court. *See generally,* Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969); Kaplan, *1966 Amendments* at 377, 380-81.

gress completed a revision of federal Rule 23.[6] This revision was an attempt to ensure, through a stream-lined set of procedures, both an efficient application of the Rule to possible class actions suits, and a measure of procedural fairness during the course of such actions.[7] The intent of this reorganization was to mold the structure of Rule 23 around the intricacies and practicalities of class litigation, rather than to force applicants to tailor their cases so as to come within the ambit of a very mechanical structure.[8] It was believed that the revision would help provide two of the hoped for benefits of the class action: the reduction of case loads and an incentive to suit.[9]

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[6] FED. R. CIV. P. 23 provides, in relevant part:

(a) Prerequisites to a class action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class actions maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by order whether class action to be maintained; notice; judgement; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

[7] 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01[8] at 23-24 (2d ed. 1975) [hereinafter MOORE]

[8] *See*, Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L. J. 1204, 1214 (1966).

[9] *See* Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

The prerequisites to a class action provided by Rule 23 (a) are: that the class is too numerous for practicable joinder;[10] that questions of law or fact are common to the class;[11] and that the representatives are proper champions of the class.[12] Meeting these threshold requirements is not conclusive of class status, however, for the party seeking to represent a class must also show that the action satisfies at least one of the three subdivisions of Rule 23(b).[13] Rule 23(b)(1) provides that proponents of class action status must show that repititious litigation might establish inconsistent results or incompatible standards of conduct for the opposing party,[14] or that individual litigation might be dispositive of similar claims of other class members or injurious to the ability of the others to protect their interests.[15] Alternatively, the party seeking certification might attempt to satisfy subdivision (b)(2), which is a recognition that the party against whom the action is maintained may have acted in a manner applicable generally to all members of the proposed class, so that injunctive or declaratory relief would remedy the claims of the class itself.[16] Finally, Rule 23(b)(3) cites as proper for class certification those actions in which such common predominating questions of law or fact are presented that the class action is superior to any other type of action.[17] As such, subsection (b)(3) is distinguished from actions brought under (b)(1) and (b)(2) in that there is no need of a claim for common relief.

In determining whether a particular group comes within the parameters of Rule 23, a court must actively attempt to balance competing interests. For example, the court must decide whether the problems in defining and managing a class action are outweighed both by the reduction in caseload which occurs when several actions are incorporated into one, and by the improved litigating posture for small claimants when they proceed as a class. Thus, the application of Rule 23 to a proposed class action entails considerable judicial input,[18] which is apt to be time-consuming and to immerse the court in numerous, complex pre-trial determinations. Notwithstanding these

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[10] FED. R. CIV. P. 23(a)(1).

[11] FED. R. CIV. P. 23(a)(2).

[12] FED. R. CIV. P. 23(a)(3), (4). *See* 3B MOORE, ¶ 23.02-2 at 23-153.

[13] 3B MOORE, *supra* note 2, ¶23.02-2 at 23-153.

[14] FED. R. CIV. P. 23(b)(1)(A).

[15] FED. R. CIV. P. 23(b)(1)(B).

[16] FED. R. CIV. P. 23(b)(2). This provision apparently encompasses such areas as civil rights litigation, where all members of a given group are similarly situated as regards the effect of the opposing party's action, and where equitable relief would be the most effective remedy for the alleged common injury. *See* Kaplan, *1966 Amendments, supra* note 4, at 389: "When the party opposing a class had acted on grounds apparently applying to the whole group, a representative suit should be available to secure for the class any appropriate injunctive or declaratory relief."

[17] FED. R. CIV. P. 23(b)(3). See 3B MOORE ¶ 23.45[1] at 23-703. FED. R. CIV. P. 23(c)(1) provides that a class certification order may be conditional, subject to amendment or withdrawal.

[18] Dolgow v. Anderson, 43 F.R.D. 472, 481-82 (E.D.N.Y. 1968) (exhaustive discussion of the requisite findings which precede certification of a class).

difficulties, courts have been mindful of the fact that the class suit is a federally created remedy.[19] As such, as soon as "the court is convinced that there is substantial merit to plaintiff's claims and that the class action device is the practicable method of vindicating these claims, it will not let procedural difficulties stand in its way."[20] This general attitude has led the judiciary to respond to Rule 23 by resolving any doubts as to the propriety of certification in favor of allowing the class action.[21]

Although this liberality is not absolute, and some actions will not be certified, the trend illustrates an aspect of Rule 23 that has been criticized: namely, the extent to which trial courts have discretion to grant or deny class status.[22] The argument is made that if the trial judge had complete discretion in this matter, then his determinations could not be reviewed in an immediate appeal to the circuit court.[23] The position is countered however, by those who claim that the Rule contains a set of objective criteria whose applicability is suspectible to appellate review.[24] If the former argument is adopted, then the only recourse available to a movant is the writ of mandamus; the latter theory would, however, permit an interlocutory review of the order.

The controversy over the question of when a determination of class status is appealable has surfaced in two respects: whether a plaintiff who has been denied representative status should be able to invoke immediate appellate review as of right; and whether a defendant has a similar opportunity to appeal an order certifying a class. The central issue in each case is whether the order in question is appealable under section 1291 of the United States Code,[25] which dictates that appeal will not lie from an order unless that order is final. In ap-

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[19] *Id.* at 481.

[20] *Id.*

[21] Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), *quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

[22] See Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO L. J. 1204, 1228 (1966), where the author reproduces Mr. Justice Black's dissent to the transmittal of the 1966 Amendments. Justice Black was of the opinion that the revised Rule 23 would "place too much power in the hands of the trial judges," a problem which could be solved by a set of carefully articulated legal standards.

[23] This is particularly relevant in terms of an appeal under 28 U.S.C. § 1292(b), since several authorities suggest that matters vested in the discretion of the trial court cannot be appealed through an interlocutory proceeding. *See, e.g.*, 9 MOORE, *supra* note 7, ¶ 110.22[2] at 261; C. WRIGHT, LAW OF FEDERAL COURTS 463 (2d ed. 1970).

[24] *See, e.g., Report of American Bar Association, Special Committee, Federal Rules of Civil Procedure*, 38 F.R.D. 95, 104 (1965):

[T]here has been substituted for . . . what appeared to be mechanical tests utilizing seemingly fixed terms . . . more descriptive terminology. As indicated below, we approve the amendments as providing more accurate guides for the exercise of judicial control over procedure in practice. We should be disturbed, however, if the change in the *form* of the Rule caused the Courts to determine that [the new Rule involves] only questions of "discretion" not subject to review under Subdivision (b) of Section 1292 of Title 28.

[25] 28 U.S.C. § 1291 (1970). The statute provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

plying section 1291, the Court has often stressed the importance of the rule of finality.[26] However, this position has been tempered by the realization that a narrow and strict application of that principle is unworkable in certain situations. Consequently, the court has created several exceptions to the general rule,[27] with the result that certain orders which are in reality interlocutory are treated as final for the purpose of allowing an immediate appeal by right.

If an order does not fall within section 1291 or one of its exceptions, then usually the only mechanism of appeal is found in section 1292 of the code.[28] Such orders are treated as interlocutory, and as such they are not appealable as of right;[29] rather, under section 1292(b)[30] the trial court has discretion to certify the order for appeal and circuit court has discretion to deny review.

In some instances, an order denying class action status has been deemed interlocutory, and thus there is no appeal as of right under section 1291.[31] A small number of orders granting class certification have, however, been appealed immediately, not through the statutory

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[26] *See, e.g.*, Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848).

[27] The Court has allowed certain appeals by right from certain orders issued before a final judgment has been entered in the following cases: Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (exception for orders "fundamental to the further conduct of the case"); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (exception for orders "collateral to the case and separable from the merits"); Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) (exception for orders visiting "irreparable harm").

[28] 28 U.S.C. § 1292 (1970).

[29] 28 U.S.C. § 1292(a) (1970), however, delineates several circumstances susceptible to immediate appeal. This section provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions; or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court;
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> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
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> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;
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> (4) Judgments in civil actions for patent infringement which are final except for accounting.

[30] 28 U.S.C. § 1292(b) (1970) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[31] *E.g.*, King v. Kansas City S. Indus., 479 F.2d 1259, 1260 (7th Cir. 1973).

methods of section 1291 or 1292, but through the operation of the death knell doctrine developed by the Second Circuit.[32] Under this doctrine, a plaintiff whose individual claim is so small that the denial of class status would force him to cease the litigation due to the unavailablity of counsel, has the right to bring an immediate direct appeal.[33] In the same manner, courts usually deny defendant's appeals from orders granting class status as not final, although the recent emergence of the reverse death knell doctrine,[34] also initiated by the Second Circuit,[35] has provided for the immediate appeal of class certification orders in situations where the potential recovery is very large, and where the plaintiff could appeal under the death knell rule if class status was denied.[36]

In light of this situation, the manner in which the Supreme Court has applied the section 1291 rule of finality becomes crucial to the ability to appeal an order granting or denying class status, and thereby becomes crucial to the class action strategy itself. The creation of the two death knell doctrines, as they are interwoven with previous judicially defined exceptions to the final order rule, mark a significant development in the law pertaining to class action suits. An understanding of the class action suit therefore necessitates an inquiry into the pivotal question of whether parties to a class action have a right immediately to appeal orders granting or denying class status, or whether their appeal of such an order should depend upon the discretion of the courts. Resolution of this issue requires first a close examination of the available avenues of appeal, both those legislatively mandated and those judicially created. This initial examination will serve as a framework within which the newly developed doctrines that allow appellate review of certification orders will be considered. In light of this consideration, it will be suggested that, while the plaintiff-oriented death knell doctrine is consistent with the rule of finality as it has been traditionally expressed and interpreted, the reverse death knell doctrine is not. Rather, defendant's appeals from class certification orders should be defined as interlocutory only, thereby requiring use of the legislative method of appeal contained in section 1292(b).

I. APPEALABILITY

A. *Final Orders*

The conceptual basis for the rule of finality, presently codified

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[32] Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*).

[33] See text at notes 109-117 *infra*.

[34] Blackie v. Barrack, 524 F.2d 891, 896 (9th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (Oct. 5, 1976).

[35] Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1309 (2d Cir. 1974).

[36] See text at notes 166-201 *infra*.

in section 1291 of the Judicial Code,[37] can be found in two policy considerations. First, the rule is grounded in the belief that the district courts should be given primary control of litigation, free from constant monitoring by the circuit courts.[38] By conditioning review upon finality, the rule serves to minimize tension between the district and appellate courts.[39] The second policy consideration supporting the rule is the desire to avoid piecemeal litigation by seeking to ensure that there is only one appeal for each case rather than several.[40] This policy further serves to reduce the amount of judicial time devoted to each action, and increases the likelihood that a circuit court will be presented with a "ripe" record containing all the facts necessary to a complete consideration of the order entered below by the district court.[41]

Since section 1291 permits appeals only from "final" orders, definition of that term is central to the question of appealability. This problem is complicated by the several different definitions of finality which have been proposed. For example, it has been suggested that an order is final if it is one which ends litigation on the merits, leaving nothing but the execution of judgment.[42] "Finality" also has been deemed to attach to an order which is no longer open to reconsideration.[43]

In that these definitions focus only upon those orders which, chronologically, are issued at the close of a trial on merits, they are of limited usefulness, since some orders issued during or even before a trial can have an equally conclusive or "final" effect. The Supreme Court has recognized that where such orders are concerned, strict adherence to a narrow definition of finality may visit undeserved and

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[37] 28 U.S.C. § 1291 (1970).

[38] Parkinson v. April Indus., Inc., 520 F.2d 650, 652 (2d Cir. 1975). *See* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1302 (1970) [hereinafter, Note, *Interlocutory Appeals*]. In *Parkinson* the Second Circuit noted that "step-by-step intrusions by the appellate courts . . . might engender a debilitating lessening of respect for the capabilities of district judges." 520 F.2d at 652. This respect is necessary to the efficient functioning of the court system. The resulting tendency towards the orderly conduct of litigation also promotes a "healthy legal system." Cobbledick v. United States, 309 U.S. 323, 326 (1940).

[39] Parkinson v. April Indus., Inc., 520 F.2d 650, 652 (2d Cir. 1975).

[40] Catlin v. United States, 324 U.S. 229, 233-234 (1945); Cobbledick v. United States, 309 U.S. 323, 325 (1940). *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961) [hereinafter Note, *Appealability*]. Judicial economy has become an increasingly important consideration. *See generally*, Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

[41] Note, *Class Action Certification Orders: An Argument for The Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621, 631 (1974) [hereinafter Note, *Defendant's Right to Appeal*].

[42] Catlin v. United States, 324 U.S. 229, 223 (1945); 4 C.J.S.-*Appeal and Error* § 94(a) at 252 (1957).

[43] Hatzenbuhler v. Talbot, 132 F.2d 192, 193 (7th Cir. 1943).

irremediable harm.[44] The Court has therefore created three judicial exceptions to the rule: an exception for orders resulting in irreparable harm;[45] one for collateral orders;[46] and a third for orders concerning rights fundamental to the further conduct of the case.[47] These exceptions effectively recognize certain orders as final which might otherwise be treated as interlocutory and therefore not appealable as of right.

The first exception was formulated in *Forgay v. Conrad*,[48] where the Supreme Court held that orders which result in irreparable injury are final and appealable under the predecessor of section 1291.[49] In *Forgay*, the trial court had ordered that certain disputed deeds be set aside as fraudulent and void, with a resultant transfer of title to the plaintiff-appellee. It then continued the case until a court-appointed master could take an accounting of any profits which defendant-appellant may have received during the period between the filing of the bill and the delivery of the property.[50] The appellants appealed on the theory that the order was final. The appellees contended that the order could not be final since the accounting remained unaccomplished.[51] Upon review, the Supreme Court rejected this contention, noting that the issue of title had been decided, and that the district court's order required the transfer of the land.[52] Were the appeal to be delayed until after the accounting, the property might well be sold. The appellant then would not be able to recover it and would thereby be irreparably harmed.[53]

In *Cohen v. Beneficial Industrial Loan Corporation*,[4] the Court delineated a second exception to the finality rule for orders collateral to the main issues and separable from the merits. *Cohen* was an action brought against the officers and directors of the corporate defendants

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[44] *See* Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848):

> Undoubtedly [the order at issue] is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

Also, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) ("[w]hen that time comes [when the entire case is susceptible to appeal], it will be too late effectively to review the present order, and the rights conferred . . . will have been lost, probably irreparably.")

[45] Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) (accounting and distribution of profits from disputed land). See text at notes 48-53 *infra*.

[46] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (pre-trial indemnification for costs and fees). See text at notes 46-52 *infra*.

[47] Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (pre-trial dismissal of several claims). See text at notes 53-65 *infra*.

[48] 47 U.S. (6 How.) 201 (1848).

[49] 1 Stat. 73, 84 (1789).

[50] 47 U.S. (6 How.) at 202-03.

[51] *Id.*

[52] *Id.* at 204.

[53] *Id.*

[54] 337 U.S. 541 (1949).

charging them with fraudulent mismanagement of corporate assets.[55] An initial issue arose as to whether the plaintiff should indemnify the legal expenses incurred by the other party.[56] The district court decided that a state law which required a plaintiff pressing a small claim to indemnify the defendant against costs and attorneys' fees was not applicable to an action brought in federal court.[57] The circuit court, accepting a section 1291 appeal, believed that the state law was applicable and reversed.[58] The Supreme Court found that the circuit court had jurisdiction over the appeal, stating that the applicability of section 1291 was not limited to those orders which terminate an action,[59] but included those orders which "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent to the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[60] The Court acknowledged, however, that the *Cohen* exception would include neither orders which remain subject to change as the action progresses at trial[61] nor those which will merge with the final judgment,[62] since such orders would not be fully independent of the issues central to the case.

The third exception to the finality rule was formulated in *Gillespie v. United States Steel Corp.*,[63] where the Court held that orders which are fundamental to the conduct of the case are final.[64] Petitioner brought this suit as administratrix of the estate of her son, who had died while working on respondent's ship. She sought to recover damages for wrongful death, both for herself and for the decedent's dependent sister and brother.[65] The action was based in negligence under the Jones Act,[66] general maritime law,[67] and Ohio statutes.[68] The district court found that the Jones Act provided the sole remedy, and consequently, that the brother and sister were not entitled to any benefits.[69] The plaintiff immediately appealed to the circuit court and also sought a writ of mandamus to compel the district court either to strike the order or to certify a section 1292(b) appeal.[70] The circuit court, treating the appeal as final, affirmed the

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[55] *Id.* at 543.

[56] 7 F.R.D. 352, 353 (D.N.J. 1947).

[57] *Id.* at 355.

[58] Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948).

[59] 337 U.S. at 545.

[60] *Id.* at 546.

[61] *Id.* ("[S]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.")

[62] *Id.*

[63] 379 U.S. 148 (1964).

[64] *Id.* at 154.

[65] *Id.* at 149-50.

[66] 46 U.S.C. § 688 (1970).

[67] 379 U.S. at 150.

[68] OHIO REV. CODE ANN. § 2125.01.

[69] 379 U.S. at 150-51.

[70] *Id.* at 151.

district court's order.[71] The Supreme Court, while noting that a section 1292(b) appeal would have been proper, decided that the circuit court had correctly promoted the congressional policy underlying section 1292(b)[72] by allowing a section 1291 appeal.[73] This result was found appropriate because the issues involved in the order were deemed "fundamental to the further conduct of the case,"[74] particularly in light of the fact that the brother and sister might have suffered an injustice if their claims for recovery were allowed to be vitiated by the district court's order.[75]

These three judicial exceptions were fashioned to remedy the unusual situation in which a narrow application of the section 1291 rule of finality would result in irreparable injury.[76] The task of identifying these exceptional circumstances is often a difficult one, though, since there is a spectrum of orders falling between those which are clearly final, and those which are obviously interlocutory. In these marginal cases the decision as to the availability of an appeal involves a balancing of the costs and inconvenience of piecemeal review against the possibility of injustice through delay.[77] In this situation, the rule of finality must be given a "practical rather than a technical construction."[78]

B. *Interlocutory Orders.*

Cognizant that strict adherence to the rule of finality might work

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[71] 321 F.2d 518, 522, 532 (6th Cir. 1963).

[72] See text at notes 73-95 *infra*.

[73] 379 U.S. at 154.

[74] *Id.* at 153-54.

[75] *Id.* at 153.

[76] It could be postulated that the standard used by the Court in determining when an intrusion into the realm of finality is justified has been lessened over the years. For instance, in *Forgay*, the Court noted that the appellants would be "subject to irreparable injury" should the order remain in force. 47 U.S. (6 How.) 201, 204 (1848). Sixty years later, the standard was apparently less strict. In *Cohen*, the Court noted that certain rights *might* have been lost, "*probably* irreparably." 337 U.S. 541, 546 (1949) (emphasis added). In *Gillespie*, the Court stated, in deciding not to remand, that the time element "might work a great injustice" on the parties. 379 U.S. 148, 153 (1964). These are not incompatible standards, however, as the language merely illustrates the probable result of a refusal by the Court to give a practical construction to the rule of finality. The test remains one of balancing the costs and inconvenience of allowing piecemeal review, against the potential injustice that might result. *Gillespie*, 379 U.S. at 152-53.

[77] 379 U.S. at 152-53.

[78] *Cohen*, 337 U.S. at 546. As one scholar has commented, "The source of the difficulty [in defining finality] is that the Court, torn between the usual wisdom of the final judgment rule and its inappropriateness in certain unusual situations, has followed 'a pragmatic approach to the question of finality'." C. WRIGHT, *Handbook of the Law of Federal Courts* § 101 at 453 (2d ed. 1970) [hereinafter C. Wright, FEDERAL COURTS], *quoting* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962). Application of this pragmatic view, while a permissible *expansion* of the traditional definition of finality, Wright, *supra* at 458, should be confined to the unusual case lest they undermine the rule of law governing appealability under section 1291, Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 320 (1967).

injustice, Congress delimited two methods of appeal from interlocutory orders in section 1292.[79] Section 1292(a) provides for appeal as of right from a limited class of interlocutory orders, such as those granting or affecting injunctions, or those issued in admiralty cases and in civil actions for infringement of patents.[80] Appeals from other interlocutory orders may be brought under section 1292(b). These appeals are, however, subject to the dual discretion of both the district and circuit courts, since under 1292(b) the district court must first certify the appeal, over which the circuit court *may* then exercise its jurisdiction.[81] By requiring that both the district and circuit courts exercise discretion in allowing the appeal, the section prevents dilatory tactics and spurious appeals.[82]

Section 1292(b) requires that the district court state in writing that the order being appealed concerns a controlling question of law, that there is ground for difference of opinion as to the efficacy of the order which was entered; and that an immediate appeal would materially advance the resolution of the case.[83] A matter of major concern to the courts is defining the phrase "controlling question of law" for purposes of section 1292(b). It has been suggested that a "controlling question" must be one that is dispositive of the case.[84] Yet Congress itself indicated that a section 1292(b) appeal might lie from orders involving impleader or change of venue,[85] orders which certainly cannot be deemed crucial to the continuation of the case. Although this difference between judicial and congressional attitudes indicates that the issue is not yet settled, it appears that the order must concern some rule of law which will have a material effect on the course of the lawsuit.[86]

The second prerequisite for a section 1292(b) appeal, that there is a difference of opinion concerning the rule of law adopted by the court, requires that the difference be substantial.[87] This requirement seems a natural one: every order issued will have been argued by both parties to the suit and it seems unlikely that the conflicting opinions urged by opposing parties should ever support a section 1292(b) appeal. Moreover, it is unlikely that a district judge would certify an order for appeal where there is only an inconsequential difference of opinion.[88] Further, the requirement of substantiality seems mandated

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[79] 28 U.S.C. § 1292 (1970).

[80] *Id.* § 1292(a). For the relevant text of § 1292(a) see note 29 *supra.*

[81] *Id.* § 1292(b). See note 30, *supra,* for the relevant text of § 1292(b).

[82] Holtzoff, *Interlocutory Appeals in the Federal Courts,* 47 GEO. L.J. 474, 479 (1959); Note, 54 GEO. L.J. 940, 943 (1966).

[83] *See,* Wright, *The Interlocutory Appeals Act of 1958,* 23 F.R.D. 199, 202 (1959).

[84] *See* Note, *Appealability, supra* note 32, at 379.

[85] H.R. REP. NO. 1667, 85th Cong., 2d Sess. 1-2 (1958), *quoted in,* Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958).

[86] *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir. 1974).

[87] S. REP. NO. 2434, 85th Cong., 2d Sess., *reprinted in,* [1958] U.S. CODE CONG. & AD. NEWS 5255, 5257.

[88] *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 754-55 (3d Cir. 1974).

by the policy considerations underlying section 1292(b). Any lesser standard would allow numerous wasteful appeals and would increase the time spent on any one case, rather than aid in simplifying and resolving complex litigation. The requirement of substantiality may be satisfied when the order entered is contrary to the weight of authority,[89] when there is a clear split among the circuits on the controverted point,[90] or when the order involves a novel issue.[91]

In certifying section 1292(b) appeals, courts have relied less frequently upon the third criterion, which is based on a determination whether an appeal would materially advance the progress of the litigation.[92] In fact, this ground seems most often invoked when the case could be tried and decided in a few days.[93] While this is admittedly a salutary way in which to use section 1292(b), it is suggested that this criterion, used in conjunction with either or both of the two others, could be advantageously applied to validate an appeal from an order issued during what promises to be a very long trial. The material advancement of any litigation is a goal to be sought. It seems logical that the more time that is freed, the more willing the courts should be to certify appeals.

Shortly after section 1292(b) was enacted, the Third Circuit examined the application of the section's three requirements in *Milbert v. Bison Laboratories, Inc.*[94] In *Milbert,* an action based on negligence, the corporate defendant moved to dismiss the action, and in the alternative to quash the return of the service of summons.[95] The trial court found that a question of fact existed concerning the allegation that the defendant had fraudulently incorporated in another state to limit its tort liability.[96] The defendants then attempted a section 1292(b) appeal. The circuit court found two defects fatal to the appeal. First, the trial judge had not certified the appeal; second, the statutory ten day period within which an appeal must be filed[97] had run.[98] This result obtained because the court believed that the new law should be "strictly construed and applied."[99] In addition, the court indicated that this section should be applied only to those "exceptional" cases

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[89] *See* Note, 54 GEO. L.J. 940, 947 (1966).

[90] *See* Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code,* 69 YALE L.J. 333, 342 (1969).

[91] *See* Note, 54 GEO. L.J. 940, 948 (1966); *see, e.g.,* Chadwick v. Air Reduction Co., 239 F. Supp. 247, 250 (N.D. Ohio 1965).

[92] One case which did rely upon this ground in rufusing to certify an appeal was Public Util. Dist. No. 1 v. General Elec. Co., 230 F. Supp. 744 (W.D. Wash. 1964).

[93] *E.g.,* Kraus v. Board of County Rd. Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966).

[94] 260 F.2d 431 (3d Cir. 1958). Section 1292(b) was enacted 2 September 1958, the district court order was entered 24 September 1958, the appeal was submitted 20 October 1958 and decided 28 October 1958.

[95] Wymer v. Bison Laboratories, Inc., 166 F. Supp. 3, 4 (W.D. Pa. 1958).

[96] *Id.*

[97] 28 U.S.C. § 1292(b) (1970).

[98] 260 F.2d at 435.

[99] *Id.*

where an intermediate appeal would obviate lengthy and expensive litigation, lest the "floodgates" be opened to countless appeals.[100]

In reaching this decision, the *Milbert* court drew extensively from legislative history,[101] including the Senate Report on the bill.[102] This report noted that allowing intermediate appeals from orders which, if reversed, would have a substantial effect on the course of litigation, would result in a lightening of the case load at the district court level.[103] The Senate Report also stated that an avenue of appeal was particularly needed for orders which were entered *in a plaintiff's favor,* for such orders do not terminate the litigation and therefore were not appealable prior to the enactment of section 1292(b).[104] Since the purpose behind section 1292(b) would be frustrated were the statute to become a means of bringing spurious appeals, Congress provided that both the circuit and district courts must exercise discretion before an appeal is allowed.[105]

Milbert and the Senate Report, taken together, seem to indicate a judicial and legislative concern over the plight confronting suitors in complex litigation. On this basis, it appears that section 1292(b) was primarily intended to alleviate the burdens on judicial time and litigants' resources presented by longthy and expensive litigation.[106] Section 1292(b), then, complements section 1291 by providing an avenue of appeal—albeit at the court's discretion—from orders which do not fit within a technical definition of finality. Yet section 1292(b) did not displace the exceptions to the final order rule embodied in section 1291. Indeed, one exception to section 1291, created by the Supreme Court in *Gillespie v. United States Steel Corp.* for orders fundamental to the case,[107] was fashioned eight years *after* the enactment of section 1292(b). Such action by the Court may be viewed as a judicial recognition that certain orders which do not conform precisely to the criteria of finality, should nevertheless be appealable as of right, and should not be subject to a court's discretion. It must be assumed that the Court, aware of the availability of section 1292(b) appeals, wished to further delineate a sub-set of cases involving exceptional circum-

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[100] *Id.* at 433.

[101] *Id.* at 433-35.

[102] S. REP. NO. 2434, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Admin. News 5255.

[103] *Id.* at 5256-57. The report cited as an example, a case in which a circuit court, eight months after the order had been entered, found that the district court should have granted a motion to dismiss for lack of jurisdiction.

[104] *Id.* at 5256.

[105] *Id.* at 5257.

[106] *Cf.* 379 U.S. 148 (1964); see text at notes 63-75 *supra.* The ABA Committee on Rules stated that section 1292(b) should be used more frequently to aid in clarifying the application of the rules of federal procedure, including the revised Rule 23. Report of American Bar Association Special Committee, Federal Rules of Procedure, 38 F.R.D. 95, 104 (1965). The strict interpretation of § 1292(b) found in *Bison* was specifically criticized. *Id.*

[107] 379 U.S. 148 (1964). See text at notes 63-75 *supra.*

stances. Thus, the exceptions to section 1291 would seem to be an affirmative statement by the Court that some burdens can only be remedied by appeals by right. Clearly, the Supreme Court has taken the initiative in fashioning a valuable tool out of what could be a sterile legislative scheme. It remains to be seen, though, whether the circuit courts have taken a similarly permissible stance in the class action area.

II. THE DEATH KNELL DOCTRINE

The death knell doctrine was created by the Second Circuit to allow appeals in the limited situation in which orders denying a plaintiff class status are seen to come within the purview of the *Cohen* collateral order exception in that such orders have concluded certain of plaintiff's rights.[108] Such orders have therefore been deemed final and appealable under section 1291.[109] Thus, when a plaintiff, possessed of a very small claim, is denied representative status, he or she has the right to appeal this decision to the circuit court.[110] The scope of the death knell doctrine is narrow, as it applies only to those cases in which the individual claim is so small that there is no incentive for a plaintiff to pursue the litigation alone, so that the denial of class certification effectively terminates the action.[111]

The death knell doctrine had its inception in *Eisen v. Carlisle and Jacquelin* (*Eisen* I),[112] where the plaintiff sued two major "off-lot" dealers on the New York Stock Exchange for allegedly violating the antitrust and securities laws.[113] The district court granted the defendant's motion to deny class certification, but without prejudice to the plaintiff's ability to pursue the suit alone.[114] The Second Circuit allowed the plaintiff to appeal this order under section 1291.[115] Acknowledging that not all such orders are appealable, the court of appeals relied on the Supreme Court's willingness to apply the finality rule pragmatically rather than harshly.[116] Assessing the facts in this light, the court found that the case came within the *Cohen* collateral order exception, since the order denying certification was separable from the merits. Further, the order entered by the district court was

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[108] For a discussion of *Cohen* see text at notes 46-52 *supra*.

[109] Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See* Parkinson v. April Indus., Inc., 520 F.2d 650, 653 n.1 (2d Cir. 1975); Blackie v. Barrack, 524 F.2d 891, 895-96 (9th Cir. 1975). *But see* King v. Kansas City S. Indus., 479 F.2d 1259, 1260 (7th Cir. 1973).

[110] Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966); where the denial of class status "is the death knell of the action, review should be allowed."

[111] *Id.*

[112] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

[113] *Id.* at 119-20.

[114] 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

[115] 370 F.2d at 121.

[116] *Id.* at 120. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964).

found to work irreparable harm on the plaintiff, as no competent lawyer would undertake the litigation of such a small claim.[117] Absent an immediate appeal, then, the cause of action would probably never have been litigated.

To trigger the application of the death knell rule, a plaintiff's claim must fall within a relatively small range of dollar requirements. The Second Circuit refined the death knell doctrine in two cases decided together, *Korn* v. *Franchard Corp.* and *Milberg* v. *Western Pacific Railroad Co.*[118] In *Korn*, plaintiffs had purchased interests in a limited partnership, relying upon an allegedly misleading prospectus.[119] The average investment of the claim which plaintiffs sought to represent was fixed at $5,000.[120] The district court denied class status because it believed that joinder of the members of the proposed class was not impracticable, and that the requirements of Rule 23(a)(1)[121] had therefore not been satisfied.[122] The Second Circuit applied the death knell doctrine and allowed the appeal.[123]

In *Milberg*, plaintiff alleged that she had bought sixty-five shares of defendant's common stock in reliance upon an overly optimistic estimate of quarterly earnings printed in an article published by the defendant, Dow Jones.[124] The district court denied the motion for class status, finding that plaintiff had failed to make a showing of a substantial possibility of success on the merits.[125] Despite the holding in *Korn*, the circuit court refused to apply the death knell doctrine in *Milberg* and denied the appeal.[126]

The operative distinction between the two cases is the amount sought in damages. In *Korn*, the highest estimate of damages, $386 was so little as to make further action unlikely.[127] In *Milberg*, however, the claim was at least $8,500, a figure so near the federal jurisdictional minimum as to suggest that the suit would be pressed individually by the plaintiff.[128] The difference between these dollar figures il-

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[117] As the Second Circuit stated:

> We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

370 F.2d at 120; see text at note 37 *supra.*

[118] 443 F.2d 1301 (2d Cir. 1971).

[119] *Id.* at 1303.

[120] *Id.*

[121] FED. R. CIV. P. 23. See note 2 *supra.*

[122] [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH). ¶92,845, at 90,167 (S.D.N.Y. 1970).

[123] 443 F.2d at 1306.

[124] *Id.* at 1303.

[125] 51 F.R.D. 280, 282 (S.D.N.Y. 1970). *See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968).

[126] 443 F.2d at 1306-07.

[127] *Id.* at 1306.

[128] *Id.* at 1306-07. This figure included both plaintiff's individual $1000 claim, and the $7500 claim presented by her attorney-husband.

lustrates both the narrow range within which the death knell rule will operate, as well as the strength of the Second Circuit's stance that, but for the carefully tailored death knell exception, class designation orders are not final and therefore cannot be appealed.[129] While the court gave thoughtful consideration to arguments advanced in favor of broad appealability, this position was rejected, primarily out of fear of a resulting case overload at the circuit court level. The court believed that to avoid such backlogs the death knell doctrine must be given a limited interpretation.[130]

In *Korn* can be found the germination of discontentent with the death knell doctrine. Judge Friendly, while concurring in the result and acknowledging the decision as the logical answer to the application of existing law,[131] nevertheless questioned the continued vitality of the death knell doctrine. While Friendly recognized that the doctrine presented a valuable aid to small claimants,[132] he was disturbed by the ad hoc nature of its application.[133] Apparently, Judge Friendly's concern lay in the fact that the death knell doctrine required that each case be measured against the nebulous concept of "motive for continuing the suit,"[134] without any judicial delimitation of the point at which this incentive ends and disincentive begins.[135] Judge Friendly was further disturbed by the inequality of treatment afforded defendants who could not invoke the death knell doctrine upon certification of a class.[136]

Although the death knell doctrine has generally met with approval,[137] Judge Friendly is not alone in his opposition to the rule.

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[129] *Id.* at 1305.

[130] *Id.*

[131] *Id.* at 1307 (Friendly, J., concurring).

[132] "I am not sure it affords a rule that is truly workable, or, indeed, is legally sustainable." *Id.* at 1307. In Shayne v. Madison Square Garden Corp., 491 F.2d 397, 400-01 (2d Cir. 1974), the Second Circuit declined to review the death knell doctrine, since *Eisen III* was at that time pending at the Supreme Court, 417 U.S. 156 (1974), and the question of appellate jurisdiction to hear appeals from class designation orders had been briefed and argued at the request of the Court. For an overview of the history of the *Eisen* cases, see Note, 16 B.C. IND. & COM. L. REV. 254 (1975). In *Shayne*, the claim was sufficiently close to the $8,500 involved in *Milberg* to make the order non-appealable under § 1291. 491 F.2d at 402.

[133] 443 F.2d at 1307.

[134] Shayne v. Madison Square Garden Corp., 491 F.2d 397, 402 (2d Cir. 1974).

[135] Eventually, some dollar figure would undoubtedly be reached, above which no appeal would lie. Beyond any problems with the arbitrary nature of such a rule, establishing this figure would involve much judicial time and litigational expense, as case after case was examined to determine where the line should be drawn.

[136] 443 F.2d at 1307. A major rationale underlying the reverse death knell rule was to remedy this inequality. Parkinson v. April Indus., Inc., 520 F.2d 650, 659 (2d Cir. 1975) (Friendly, J., concurring).

[137] Several Circuits have accepted the doctrine, *e.g.*, Williams v. Mumford, 511 F.2d 363, 369 (D.C. Cir. 1975); Weingarten v. Union Oil Co., 431 F.2d 26, 28-29 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Graci v. United States, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973) (adopting a modified form of the doctrine, wherein the court required the plaintiff to first carry the burden of developing a factual record indicating that the action will terminate if a class is not certified); Ott v.

Two circuits have also noted dissatisfaction with the doctrine and have not followed the Second Circuit.[138] For example, in *Hackett v. General Host Corp.*,[139] although recognizing the role that the doctrine could play, the Third Circuit did not believe that the death knell rule came within the parameters of the *Cohen* exception to the value of finality, or that the death knell rule merited treatment as a new and independent exception.[140]

Hackett involved an antitrust action brought under the Clayton Act.[141] In *Hackett,* the district court found that the proposed class was unmanageable and therefore denied the putative representative class status;[142] the court also refused to certify an appeal under section 1292(b).[143] Plaintiffs then attempted to appeal under section 1291. The circuit court, however, declined to adopt the death knell doctrine and dismissed the appeal.[144]

First, and perhaps most importantly, the Third Circuit in *Hackett* noted that by its terms, the death knell doctrine would not apply to suits in which federal jurisdiction depends upon satisfying the jurisdictional amount.[145] A plaintiff pressing a claim in excess of $10,000 would probably continue the suit alone, and thus the rationale underlying the death knell rule—the unavailability of counsel to press a small claim[146]—would be destroyed. For the same reason, when, as in *Hackett,* a statutory scheme such as the Clayton Act provides a claim for attorney's fees and costs,[147] the plaintiff could not say that he or she could not afford counsel.[148]

These considerations in themselves would appear to have been sufficient reason for denying the appeal. However, the court further expanded its reasons for doing so, and in that process launched a vigorous attack on the death knell doctrine. Initially, the court stated its belief that the rule would not operate in suits where the objective was to safeguard rights incapable of dollar measurement, such as civil

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Speedwriting Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975) (adopting the rule formulated by the Fifth Circuit).

[138] One Circuit has rejected the death knell *per curiam,* King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973), while the Third Circuit did so after a thoughtful analysis of its applicability, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972).

[139] 455 F.2d 618 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972), *noted,* 29 WASH. & LEE L. REV. 465 (1972).

[140] 455 F.2d at 623.

[141] 15 U.S.C. § 1 *et seq.* (1970).

[142] 455 F.2d at 620.

[143] *Id.*

[144] *Id.* at 626.

[145] *Id.* This stands to reason and would follow naturally from *Milberg,* where the Second Circuit found that $8,500 was sufficient incentive to pursue a claim. If a claim alleges $10,000 damages and thus is maintainable in federal court, the plaintiff cannot claim that his case falls within the death knell exception. *Milberg,* 443 F.2d at 1306-07.

[146] 455 F.2d at 622.

[147] 15 U.S.C. § 15 (1970).

[148] 455 F.2d at 622-23.

rights suits, and suits seeking to protect the environment.[149] Further, the court acknowledged that such consumer actions as the one brought in *Hackett* have beneficial deterrent effects, but believed that such benefits must be weighed against the possibility of overloading the appellate dockets[150] and the existence and availability of alternative, discretionary means of appeal.[151] In this light the Third Circuit believed that the viability of the death knell rule was questionable.[152]

It is quite apparent that had the Third Circuit gone no further than to say that the death knell rule was inapplicable to the facts of *Hackett*, the doctrine would not have been harmed. The court's observation that "the death knell rule would operate only in that narrow category of cases where the object of the suit is the recovery of money damages, and where a statute affords federal jurisdiction regardless of amount,"[153] seems a logical limitation of the doctrine, and would not appear to vitiate its efficacy in that "narrow category." The court believed, however, that to leave even this limited area open would provide the private party an unnecessary option: "In every such instance other regulatory mechanisms are available to assert the public interest against the wrongdoer."[154] The court declined to make this option available by adopting the death knell doctrine, or by recognizing the situation which will toll the knell as one within the *Cohen* exception.[155]

Hackett proved persuasive authority for the Seventh Circuit in *King v. Kansas City Southern Industries, Inc.*[156] where plaintiffs, who sought to represent former shareholders, alleged that misleading proxy statements had been issued to induce shareholder approval of a proposed merger.[157] The district court denied certification to the proposed class,[158] and plaintiffs sought to bring a section 1291 appeal.[159] In a per curiam opinion, the circuit court rejected the death knell principle espoused in *Eisen* I, and declined to find that the *Cohen* collateral order exception was applicable.[160]

Nevertheless, the position of the death knell doctrine as a proper exception to the rule of finality should not be compromised by the decisions in *Hackett* and *King*. Although these courts relied on the availability of other remedies, this availability seems to be illusory, and

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[149] *Id.* at 622.

[150] *Id.* at 623. *See* Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

[151] 455 F.2d at 623. Such alternatives include interlocutory appeals under 28 U.S.C. § 1292(b) (1970), FED. R. CIV. P. 54(b). The district court refused to certify a section 1292(b) appeal, 455 F.2d at 620.

[152] 455 F.2d at 623.

[153] 455 F.2d at 622.

[154] 455 F.2d at 626.

[155] *Id.* at 625.

[156] 479 F.2d 1259 (7th Cir. 1973).

[157] 56 F.R.D. 96, 97 (N.D. Ill. 1972).

[158] *Id.* at 101.

[159] 479 F.2d at 1260.

[160] *Id.*

in any event not pertinent to cases where the plaintiff presses only a minimal dollar claim. The very rationale of the death knell doctrine is that the small plaintiff will not *be able to* afford an attorney. Without counsel, an unsophisticated litigant will be unable to avail himself of other remedies. Thus despite its ad hoc nature,[161] the doctrine is a salutary one aimed at ensuring small plaintiffs a forum. As such, it comports with congressional encouragement of the class action as a vehicle for co-ordinating suits by small claimants,[162] and, by subjecting large defendants to suits which otherwise might never be brought, reinforces the deterrent policies of regulatory schemes such as the Clayton Act.[163] The unique nature of the death knell doctrine, and the benefits that flow from the rule, ensure its position as a valid exception to the rule of finality.

Courts applying the death knell doctrine have viewed the rule as falling within the *Cohen* exception, in that such orders are collateral to the issues and separable from the merits.[164] Perhaps it is conceptually more correct to recognize that the death knell rule falls within a *Forgay-Gillespie* exception, since an order denying class status to the small claimant is one which is fundamental to the further conduct of the case, and one which might result in irreparable harm to the plaintiff.[165] Under either theory the result is the same: the order denying class status to the small claimant should be considered final and thus appealable under section 1291.

III. THE REVERSE DEATH KNELL DOCTRINE

The very nature of the death knell rule meant that it was applicable only to plaintiffs; defendants arguably in the same position, that is, defending a class action suit initiated and represented by a plaintiff individually possessed of a minimal claim, could not avail themselves of a direct appeal under section 1291. The Second Circuit met the problem of the disparate treatment accorded defendants under the death knell rule by developing the reverse death knell doctrine.[166]

Under the reverse death knell rule, a defendant may appeal an order granting class status by meeting a three-part test. It must first be shown that the determination is fundamental to the further conduct of the case; second, that a review of the order will not require an examination into the merits of the case; and third, that the defendant

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[161] *See* Korn v. Franchard, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).

[162] Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

[163] *See Hackett*, 455 F.2d at 623; Williams v. Sinclair, 529 F.2d 1383, 1388 (9th Cir. 1975).

[164] *E.g., Eisen I*, 370 F.2d at 120. *See Hackett*, 455 F.2d at 626, where the court distinguished the *Eisen I* and *Cohen* doctrines.

[165] *See Hackett*, 455 F.2d at 629 (Rosenn, J., dissenting).

[166] Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974). The doctrine was refined in Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974), and General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

will suffer irreparable harm if review is delayed until final determination of the case.[167] The requirement of fundamentality is the same requirement demanded by the death knell doctrine. To meet this requirement, defendants must satisfy the court that if the order were reversed, plaintiffs would be unable to continue the action.[168] To fulfill the other two prongs of the test, defendant must show that the district court failed to adhere to the requirements of Rule 23 in certifying the class, and must demonstrate the potential harm inherent in the litigation expenses and aggregate damage claims.

The issue of a defendant's ability to appeal orders granting class status was first raised in the Second Circuit in *Herbst* v. *International Telephone & Telegraph Corp.*[169] There the plaintiff alleged that defendant had violated the securities laws when it attempted a merger by selling unregistered securities.[170] The complaint sought damages or nullification of the arrangement under which the plaintiff obtained certain of the defendant's shares in exchange for a number of the shares in the insurance company with which ITT had desired to merge. Shortly after the action was commenced, plaintiff sought, and was granted, status as the representative of a class whose members included all those shareholders who similarly exchanged shares.[171] This constituted a potentially enormous group: one for which the alleged damages could conceivably have reached $110 million,[172] and defendant appealed the certification order. The circuit court, while allowing the defendant's appeal, held that the district court had properly certified the class action.[173]

In accepting the defendant's appeal, the court first analyzed the point made by Judge Friendly that, in applying the death knell doctrine, some parity of treatment should be accorded to defendants.[174] It was suggested that short of repealing the death knell doctrine for plaintiffs, such parity could be achieved by recognizing a similar exception for defendants.[175] As in *Eisen I*, the Second Circuit again relied on *Cohen* as the foundation for the new doctrine.[176] Thus, a de-

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[167] Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1312-13 (2d Cir. 1974).

[168] *See* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1098-99 (2d Cir. 1974).

[169] 495 F.2d 1308 (2d Cir. 1974). The matter was also considered, and appeal was allowed, in Eisen v. Carlisle & Jacquelin, (*Eisen III*), 479 F.2d 1005, 1005 n.1 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974), but, as the circuit court had retained jurisdiction on remand, the question of appealability was not in issue.

[170] 495 F.2d at 1310. The merger was never perfected since the Insurance Commissioner refused to approve the plan. ITT then offered the Hartford Fire Insurance Company (the intended partner in the merger) shareholders a voluntary exchange of Hartford shares for ITT preferred stock, on condition that 95% of Hartford stock be exchanged. More than 99% of Hartford shares were eventually exchanged. *Id.* at 1311.

[171] *Id.* at 1310.

[172] *Id.* at 1313.

[173] *Id.* at 1309.

[174] *Id.* at 1312. *See Korn*, 443 F.2d at 1307 (Friendly J., concurring).

[175] 495 F.2d at 1311-12.

[176] *Id.* at 1312.

fendant wishing to appeal an order designating a class must show that the order implicates issues which are fundamental to the further conduct of the case and which are separable from the merits. Such an order would thus be collateral to the case itself and would hold sufficient promise of avoiding an injustice to merit immediate review.

The court carefully considered the effect on the plaintiff were the order to be reversed. However, while the majority realized the possibility of ending the suit by allowing an immediate appeal, this consideration was not the most persuasive. Rather, the burdens presented by the factors of time and expense proved more important to the court's decision.[177] Two financial aspects to the case were particularly noted: the amounts of money which would probably be expended in defending a sprawling class action, and the threat implicit in the sum represented by the potential damages.[178] The court also recognized that the mere procedural problem of notifying all members involved significant expense and effort.[179] In addition, the court noted that the sheer size of possible liability often precipitates pre-trial settlements which are small only in relation to the damages sought,[180] and that the supervision of large class actions necessarily involved a significant drain on judicial time.[181]

The Second Circuit thus concluded that where the class is large enough to provide in terrorem incentives to pre-trial settlement, and where considerable amounts of time and money are involved, immediate review of the class certification order is proper.[182] The court added that "as appellate judges we would be reluctant to hold that a class action had been improper after the district court and the parties had expended much time and resources although we might have had serious doubts if we had reviewed the question at the inception of the action."[183] These considerations compelled the court's decision that orders granting class status should be appealable as of right under section 1291, rather than remaining dependent upon the district court's discretion under section 1292(b).[184]

The emphasis which was placed on the economic effects of the class action itself demonstrates that, despite any superficial similarity

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[177] *Id.* at 1312-13.

[178] The reverse death knell was affirmed in Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974). There, however, the Second Circuit refined its position on the role played by the potentially large damage claims and litigation costs in determining whether the reverse death knell should be applied. Recognizing that all law suits may become lengthy and expensive, the court stated that a reviewing court should focus its investigation on the "incremental cost and time in defending the particular action if it is maintained as a class action." *Id.* at 1100.

[179] *Id.* at 1312-13.

[180] *Id.* at 1313. *See* Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COM. L. REV. 515, 522 (1969).

[181] 495 F.2d at 1213.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 1213 n. 9.

to the death knell rule, the reverse death knell doctrine rests on different conceptual grounds: while the application of the death knell rule turns on the widespread belief that, without such alternative, the suit will end, the principle underlying the reverse death knell is the fear that resources of time and money may be fruitlessly expended. In one, the *probable* results govern, while in the other, the *possible* consequences are stressed.

The Second Circuit recently reaffirmed the rationale underlying the reverse death knell doctrine in *Parkinson* v. *April Industries, Inc.*[185] In this case, the defendant was alleged to have fraudulently manipulated the price of stock in violation of the securities laws.[186] The district court granted class status to plaintiff-purchasers of the defendant's stock,[187] finding that the pre-requisites of Rule 23(a) and 23(b)(3) had been satisfied. The defendant appealed this order, but the Second Circuit dismissed the appeal, indicating that the case did not call for application of the reverse death knell doctrine.[188] In dismissing the appeal, the court initially reviewed the historical background of the final order rule of section 1291.[189] Noting the finality rule's solid basis in statutory policy,[190] the court cautioned against an over-expansive application of the exceptions to this rule.[191] Still, the court acknowledged that there must be some means of immediately appealing certain orders as of right in exceptional circumstances; namely, in those situations where "the danger of denying justice by delay" outweighs "the inconvenience and costs of piecemeal review."[192] Since the complexities of a class action involve a substantial burden both on judicial time and on the resources of the defendant, the order granting class status may result in an injustice in situations where it could later be decided that the class was improperly designated. The argument is that an immediate section 1291 appeal by right would cure such injustice and would obviate both the necessity of involving the court in overseeing a complex class action, and the possibility of taxing a defendant's finances.[193]

The Second Circuit noted that allowing appeals as of right in this area would thereby give appellate courts an opportunity to provide guidance in the developing area of class litigation. The court recognized, however, that there is a narrow "line between helpful guid-

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[185] 520 F.2d 650 (2d Cir. 1975).

[186] *Id.* at 651. Specifically, plaintiff alleged that the earnings and prospects of the company had been overstated, in violation of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975).

[187] 520 F.2d at 651.

[188] *Id.* at 658.

[189] *Id.* at 652-53.

[190] *Id.*

[191] *Id.* at 653 n.1. *See also,* General Motors Corp. v. City of New York, 501 F.2d 639, 645 (2d Cir. 1974); Weight Watchers of Philadelphia v. Weight Watchers Int'l., 455 F.2d 770, 773 (2d Cir. 1972).

[192] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974).

[193] 520 F.2d at 655-56.

ance and noxious interference . . . ."[194] Since one goal of the final order rule is the preservation of this narrow line by ensuring that the circuit courts operate only on a ripe record,[195] courts must be careful that the rule of finality is not infringed. The court emphasized that the class designation area is not the only one in which an immediate appeal would remove from the district court potentially burdensome and complex litigation. However, it confirmed the idea that the district judges must be allowed to retain the primary control of a litigation.[196] Thus, before allowing a section 1291 appeal, the *Parkinson* court found that a reviewing court must assess not only whether the defendant is likely to suffer irreparable harm,[197] but also whether the appeal involves a concrete and determinative invocation of judicial power—not merely an exercise of its discretion.[198] The Second Circuit believed that these criteria would be satisfied[199] by a strict adherence to the three-part test of *Herbst* requiring that an order may be appealed only when fundamental to the further conduct of the case, when separable from the merits, and when it is onerously burdensome on the defendant.[200] In *Parkinson*, the court applied these criteria and found that the defendant was contesting only the district court's exercise of discretion. Consequently, the case was not one in which exceptional circumstances required the application of the reverse death knell rule.[201]

Judge Friendly again concurred, reiterating his position in *Korn*, and stating that the inequality of the plaintiff-oriented death knell doctrine required some positive response. Judge Friendly believed, however, that, although the reverse death knell doctrine was intended to remedy this inequity, it was not the proper response.[202] Moreover,

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[194] *Id.* at 654.

[195] See text at notes 38-39.

[196] 520 F.2d at 654.

[197] *Id.* at 653-54.

[198] *Id.* at 657. The Second Circuit quoted approvingly from its opinion in General Motors Corp. v. City of New York, 501 F.2d 639, 647 (2d Cir. 1974):

> Accordingly, we would review here not a finite and conclusive determination of judicial power—*e.g.*, the power to shift notice costs and forego individualized notice as in *Eisen*, or the power to dispense with security, as in *Cohen*—but a discretionary decision, the propriety of which will necessarily vary from case to case. That this distinction is of fundamental importance in the calculus of appealability was plainly acknowledged in *Cohen* itself.

[199] "Indeed, the three pronged test, narrowly interpreted, does not mark a departure from the final judgment rule, . . . rather, it is a corrollary to the collateral order doctrine tailored to the particular circumstances of class litigation." 520 F.2d at 658.

[200] *Id.* at 656-58.

[201] *Id.* at 658. In a footnote to the opinion, the Second Circuit emphasized that section 1292(b) appeals are the most efficient means of securing interlocutory review of a class designation order both because the use of that section obviates the need to brief and argue the issue of appealability, and because the district court delineates the issue to be decided. *Id.* at 655 n.5. Indeed, and seemingly for these reasons, the court went so far as to suggest that perhaps section 1292(b) should be the only means of presenting such orders for review. *Id.*, citing *Hackett*, 455 F.2d 618 (3d Cir. 1972).

[202] *Id.* at 659. Judge Friendly commented: "However the cure may be worse than the disease." *Id.*

Judge Friendly was willing to go even further than his position in *Korn*, proposing that both the death knell doctrine and its reverse should be discarded in deference to legislatively mandated methods of appeal.[203] Noting that initially the death knell rule had attractive qualities, Friendly believed that weaknesses in the rule had developed[204] in two respects. First, where a named plaintiff had a claim large enough to provide the incentive to continue the suit alone, unnamed members of the proposed class, possessed only of very small claims, would be denied the opportunity to press their claims where class certification is denied. Also, there remained the problem of defining the dollar point at which the denial of class status rang the death knell. These problems, when added to those posed by applying the three-part *Herbst* test in the reverse death knell situation, led Judge Friendly to maintain that orders which merely grant or deny class status should be treated as interlocutory orders appealable only under section 1292(b).[205]

This view, of course, does not mandate that plaintiffs in a class action would always be deprived of 1291 appeals. Judge Friendly was quick to note that certain situations, such as those presented in *Eisen* I, could still be rectified through immediate appeals as of right.[206] He was equally quick to state, however, that this is true because such cases fit within traditional exceptions to the final order rule. Apparently, then, according to Friendly, there was no need to create a new exception and to label it the death knell rule.

In light of this analysis, Judge Friendly then assessed the efficacy of the three-prong *Herbst* test.[207] It was his belief that the *Herbst* test confuses the issue of whether class certification orders are final, since it fails to offer a concrete standard of appealability. In support of this position, Judge Friendly initially noted that the first prong—whether the determination of a class is "fundamental to the further conduct of the case"—appeared to be nothing more than the death knell doctrine under a different name.[208] Apparently, the suggestion is that this prong, depending as it does on the size of the plaintiff's claim and not the alleged harm to the defendant, does nothing more than point out that the suit would cease were a certain class not designated. It does not deal with any aspect peculiar to an order designating a class. Further, Judge Friendly believed that the second prong—whether the order is separable from the merits—is of little use in delimiting the finality of a contested designation order, since the answer would always be in the affirmative.[209] As such, it could almost be classified as a given, and could not be cited as a reason sufficiently compelling to

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[203] *Id.* at 658.
[204] *Id.* at 659.
[205] *Id.* at 658-59.
[206] *Id.* at 660.
[207] See text at notes 167-84 *supra*.
[208] 520 F.2d at 658.
[209] *Id.*

justify bypassing the requirement of finality. Finally, the third prong—whether the defendant will suffer irreparably in terms of time and money—would apply only to classes which are very large.[210] Thus it would exclude appeals based on the consideration, among others, that the class was not too numerous as to make joinder impracticable.[211] This analysis suggests that the issue of appealability is one that can only be decided case-by-case. Further, it is this type of examination which lends itself to the apparatus provided by section 1292(b), thereby avoiding constant appeals of the question of jurisdiction to hear 1291 appeals.[212]

In Judge Friendly's view then, unless a class certification order may be appealed as of right on some ground other than the death knell or its reverse, section 1292(b) is the correct avenue of appeal.[213] Not only does this section permit a quicker determination of whether an appeal should lie than does section 1291,[214] but it provides as well for valuable input by district courts. Judge Friendly noted that this input outweighed the risk that obdurate judges may arbitrarily refuse to certify an appeal under section 1292(b). In any event, mandamus remains an answer to such arbitrariness, since the party may thereby present directly to the circuit court the grounds which militate for appeal. The likelihood that a district judge will succumb to such arbitrariness, or that attorneys will justify spurious appeals by claiming an arbitrary abuse of discretion is slim, and would not seem to foreshadow a plethora of applications for writs of mandamus.[215] Friendly further criticized the ad hoc nature of the determinations made under the death knell doctrine and its reverse as having contributed expense and delay to the litigation of jurisdictional issues. This delay results from the fact that the threshold question before the court is whether the appeal should be allowed, rather than whether the order was properly entered. The litigants must then persuade the appellate court to exert jurisdiction so that the applicability of Rule 23 may *then* be argued.[216]

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[210] *Id.*

[211] *See* FED. R. CIV. P. 23(a)(1).

[212] "Since the need for review of class action orders turns on the facts of the particular case, [§ 1292(b)] is preferable to attempts to formulate standards which are necessarily so vague as to give rise to undesirable jurisdictional litigation with concomitant expense and delay." 520 F.2d at 660 (Friendly, J., concurring).

[213] *Id.* at 660.

[214] One requirement is that the § 1292(b) appeal be filed within ten days of the order. Since this is not a full appeal, and since the district court need not stop the trial's progress while the § 1292(b) appeal is decided, the circuit may, and often must, decide whether to exercise its jurisdiction quickly. 28 U.S.C. § 1292(b) (1970); Milbert v. Bison Lab., Inc., 260 F.2d 431 (3d Cir. 1958).

[215] 520 F.2d at 660. *See* Hackett v. General Host Corp., 455 F.2d 618, 624 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972). Mandamus is one of the extraordinary means of controlling and directing the trial courts. *See generally*, Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 553-55 (1932).

[216] 520 F.2d at 660.

Judge Friendly's position has persuasive merit, except insofar as he suggests abandoning both the death knell doctrine and its reverse. The logic supporting the death knell, allowing otherwise defenseless plaintiffs to vindicate their rights, has an attractively equitable quality to it.[217] However, if the death knell rule is to be considered conceptually viable, the question of the appropriateness of judicially created exceptions encompassing orders denying class representative status must be faced. As Judge Friendly noted, the death knell rule originally stemmed from a belief that such a designation order is "fundamental to the further conduct of the case."[218] Also, the loss of the claimed right would seem to qualify as an "irreparable harm." Thus, a *Forgay-Gillespie* approach would seem more consistent with tradition than use of the *Cohen* "collateral order" rule.[219] In either event, the existing exceptions are broad enough to provide a firm base for the death knell rule, so that Judge Friendly's concern that the rule creates a new exception may very well be groundless.

While it can thus be seen that the death knell doctrine is valid, the same cannot be said for the reverse death knell rule, for defendants do not seek the vindication of allegedly violated rights. Rather, the reverse death knell doctrine provides a vehicle to avoid the congressionally approved class action mechanism, so as to minimize the costs traditionally associated with the defense of such actions.[220] Conceptually, therefore, the two doctrines are distinct, in that they rest on differing policy considerations. The death knell is founded in the desire to allow small claimants to vindicate allegedly violated rights, whereas the reverse death knell rests upon affording an opportunity for defendants to circumvent the class action. There is, therefore, no need either to approve or decry both; accepting the death knell simply does not require adopting the reverse death knell.[221]

The Ninth Circuit recently adopted this position in *Blackie* v. *Barrack*,[222] where defendants were charged with overstating profits and underestimating future losses[223] in violation of section 10(b) and

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[217] See text at notes 245-51, *infra*; Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (6th Cir. 1975).

[218] 520 F.2d at 659.

[219] See text at notes 164-65, *supra*.

[220] *See* Blackie v. Barrack, 524 F.2d 891, 899 (9th Cir. 1975); text at notes 227-30 *infra*.

[221] This view seems implicit in the decisions of several circuits which have held that, since orders granting class status do not fit within any exception to the rule of finality, section 1291 is an unacceptable means of appealing them. *E.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 752 (3rd Cir. 1974) (en banc); Thill Sec. Corp. v. New York Stock Exchange, 469 F.2d 14, 17 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969) (per curiam). *See* 9 J. MOORE, FEDERAL PRACTICE ¶110.13[9] at 184 (2d ed. 1975) [hereinafter MOORE].

[222] 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (Oct. 5, 1976).

[223] *Id.* at 894.

rule 10b-5[224] of the Securities and Exchanges Act of 1934.[225] The district court granted class status to the plaintiff, and permitted certain of the defendants to seek interlocutory review of this order under section 1292(b).[226] In addition to the discretionary interlocutory appeal, all the defendants appealed the order directly, relying on the reverse death knell theory.[227] While the circuit court granted the section 1292(b) appeal, the section 1291 appeal was dismissed.[228] In so holding, the court initially noted the soundness of the death knell's position in the historical framework of exceptions to the finality doctrine.[229] However, the Ninth Circuit found no similarly compelling reason to accept the reverse death knell. Unlike the death knell situation, where the denial of class certification will cause the plaintiff to terminate the action, the class certification order in *Blackie* was conditional and subject to alteration as the litigation continued.[230] Reliance upon the *Cohen* collateral exception for the reverse death knell doctrine was therefore inapposite, since *Cohen* requires not only that the denial of immediate review must result in loss of a right which cannot be sustained by later review, but also that the order appealed must be final and collateral.[231] The court in *Blackie* stated its intention to adhere to this position even where doing so would result in apparent injustice to the defendant. The court found that the district court's ability to decertify the class in view of later events at the trial mitigated the need for immediate review of the certification order. Thus, the denial of an appeal as of right would avoid the duplication of efforts, including appellate consideration of an order which might later be changed.[232]

In clearly distinguishing the death knell from the reverse death knell situation, the Ninth Circuit's examination focused on three issues: the separability of a class certification order from the merits of the case; the probability of irretrievably lost rights; and the factor of prohibitive litigation costs. The court initially acknowledged that some aspects of a class certification order, such as notice requirements, may be mooted after trial begins, and thus would not resurface on final

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[224] 17 C.F.R. § 240.10b-5 (1975).

[225] 15 U.S.C. § 78j(b) (1970).

[226] 524 F.2d at 894-95 & n.4. Two of the defendants did not join in a motion for reconsideration which was filed before their notices of appeal were filed. It was assumed that this took these defendants out of the court's jurisdiction.

[227] *Id.* at 894.

[228] *Id.* at 895.

[229] *Id.* at 896. The court did so to avoid "Bleak House, Judicial administration," *id.* at 895, recognizing that without the death knell rule, progeny of the accepted *Cohen* exception for collateral orders, "the right threatened by an adverse ruling will have been lost in the interim before final disposition." *Id.*

[230] *Id.* at 897. In the death knell situation also, a denial of certification may be conditional, but if economics force the plaintiff to quit the action, the status will never be altered.

[231] *Id. See* 9 MOORE, ¶110.13[9] at 184.

[232] 524 F.2d at 897.

appeal. Such orders could indeed be viewed as "separable from the merits." A difficulty encountered in applying this view to the class action situation, however, is that a close examination of such orders very often involves an impermissible intrusion into the merits,[233] since it will involve facts and issues which will later be raised, and even clarified, at trial. Apparently, the court believed that the separability of such orders, standing alone, is not sufficient to invoke the *Cohen* collateral order rule, which is designed not to defend against possible harm tangential to the issues central to the case, but to preserve legal rights. It is these legal rights which the small plaintiff wishes to protect, and it is in such a case where the *Cohen* rule should be allowed to operate.

The *Eisen* I-type plaintiff, presenting a claim of minimal dollar value, cannot preserve his rights as an individual plaintiff; with the denial of class certification, the action is concluded and the ability to argue his claim is forever lost.[234] Not so for the defendant, who is free throughout the trial to present evidence concerning the inappropriateness of the class action. If the verdict goes against the defendant, the matter may again be raised at the circuit level, as one of several exceptions to the verdict. Admittedly, this results in lost litigation expenses, but the court was not persuaded that this was reason enough to further extend the final order rule. Such irretrievably lost expenses, according to the court, do not sufficiently distinguish class certification orders from other orders such as the denial of a motion to dismiss or summary judgment, which traditionally have not been considered final.[235] The lack of immediate review in these instances similarly results in an incremental increase in costs. In fact, the costs of litigation will be reduced only if the appeal of these orders or of a certification order is allowed, and the order is reversed.[236] It is only when no other avenue of appeal is available that section 1291 can be justified as a cost-saving device. Any possible savings to the defendant, then, must be balanced against the costs in time and resources which result when the circuit court examines the appealability of an order under section 1291 and finds it nonappealable, or when the court allows the appeal but affirms the order.[237]

Further, the Ninth Circuit rejected the appellants' claim that the

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[233] *Id. See*, Note, 42 GEO. WASH. L. REV. 621, 628-29 (1974).

[234] 524 F.2d at 899. *See* Note, 42 GEO. WASH. L. REV. 621, 629-30 (1974).

[235] 524 F.2d at 898. Such orders are the refusal of motions to dismiss, for summary judgment, or for separate trials. This last analogy was noted in Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969) (per curiam), where the reverse death knell rule was not accepted.

[236] 524 F.2d at 898.

[237] *Id. See* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1098-99 (2d Cir. 1974); *cf.* Note, 42 GEO. WASH. L. REV. 621, 629-30 (1974): "Such expense, however, has not been considered sufficient to outweigh the policy considerations of the final judgment rule which prevent piecemeal review of interlocutory rulings without the benefit of a complete record."

in terrorem effects of a class action represent an irreparable harm.[238] The court found this argument to be fundamentally an attack on Rule 23 itself, and stressed that the desire to place small claimants in a litigative unit with some clout was the motive which had inspired the Rule.[239] The basis of the argument—that the size of the potential claims forces a defendant to settle even frivolous claims[240]—is a concomitant of the class action; it should not serve to invoke section 1291 as a vehicle to bypass Rule 23.[241] The in terrorem argument is further weakened by the fact that the rationale supporting the reverse death knell remains potent even when the doctrine is itself unavailable. That is, the reverse death knell doctrine cannot aid a defendant faced with a small class of plaintiffs, with large individual claims, since a prerequisite of the doctrine is that, should the plaintiffs be denied representative status, the action would terminate.[242] A discrete class then, with each member voicing a large claim, will represent an incentive to pre-trial settlement similarly forceful to that presented by a very large class of small claimants.[243] To rely on the possibility of an onerous liability to circumvent the final order rule is to open every class suit to the same attack, thereby vitiating at once the class action and the final order doctrine.

IV. APPELLATE REVIEW OF CERTIFICATION ORDERS

It would seem, therefore, as suggested by Judge Friendly[244] and the Ninth Circuit,[245] that section 1292(b) is a more appropriate means of appealing orders granting class status than is the reverse death knell doctrine. This conclusion is drawn from several factors. First, plaintiffs and defendants in a death knell situation are not actually similarly situated. Second, the order certifying a class action is tentative only, and furthermore, these orders are susceptible to the apparatus of appeal contained in section 1292(b). The plaintiff in the death knell situation—as in *Eisen* I—presses a very small claim which arises from the alleged violation of a right. The plaintiff who is denied representative status loses not only the chance of recovering the minimal judgment, but also, and more importantly, the possibility of vindicating his own rights since he will most probably be forced to foresake a claim altogether. The defendant, on the other hand, has the opportunity to litigate the merits fully, and to attack continually the validity of the certification order. The defendant, while forced to

[238] 524 F.2d at 899.
[239] *Id.*
[240] Herbst v. International Tel. & Tel., 495 F.2d 1308, 1313 (2d Cir. 1974).
[241] *Id.* at 899.
[242] *Kohn*, 496 F.2d at 1098.
[243] 524 F.2d at 899.
[244] See text at notes 212-13 *supra*.
[245] See text at notes 222-33 *supra*.

contend with admittedly burdensome expenses, does not face irretrievably lost rights. The parties are thus differently situated and may be differently treated.[246]

In addition, the order allowing a class action to proceed is often tentative and therefore not "ripe." The oftentimes conditional nature of the order indicates that the record bearing on whether or not class certification is appropriate is not fully developed.[247] It may well be that a decision by an appellate court concerning a certification order would be futile, since the same result would have been reached by the trial judge in the course of events. Such an intrusion into the duties of the district court would thus fall beyond the narrow "line between helpful guidance and noxious interference . . . ."[248] Also, an order not yet "ripe" may not actually be separable from the merits. It is for this reason that the Supreme Court specifically stated in *Cohen* that tentative orders could not be considered collateral and are therefore not final for purposes of review.[249] If they are not final, then of course, section 1291 is not applicable, and the only means of obtaining immediate appellate review is through the discretionary process available under section 1292(b). Since the reverse death knell is based upon the *Cohen* exception to the final order rule,[250] the doctrine loses its validity when the certification order is seen to be not collateral to, and separable from, the merits. Even if the analysis suggested above[251] is adopted, and the rule is viewed as an offshoot of the death knell doctrine's position within the parameters of a *Forgay-Gillespie* exception, an order certifying a class would not require treatment as a final order. First, *as to the defendant*, the certification of a class is not fundamental to the further conduct of the case; the defendant can con-

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[246] *Blackie*, 524 F.2d at 898-99; Note, 42 GEO. WASH. L. REV. 621, 631 (1974).

[247] The language of Rule 23(c)(1) is explicit on this point: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1). *See* Note, 42 GEO. WASH. L. REV. 621, 631 (1974). *See also In re* King Resources Co. v. Bottger, 525 F.2d 211, 213 (10th Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639, 646-47 (2d Cir. 1974) (Where, refusing to apply the reverse death knell theory, the court said that, unlike *Cohen* and *Eisen* I, the "determination to permit the City's action to proceed as a class action is very much 'tentative,' subject always to reconsideration as the cause of action unfolds."); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969) (*per curiam*).

[248] Parkinson v. April Indus., Inc., 520 F.2d 650, 654 (2d Cir. 1975). See text at note 170 *supra*.

[249] *Cohen*, 337 U.S. at 546; *see also*, Parkinson v. April Indus., Inc., 520 F.2d 650, 653 (2d Cir. 1975):

> An order granted prior to discovery may be reevaluated on the basis of facts emerging from a fuller record, and a decision by an appellate court upon an appeal from the initial order would not settle the propriety of the designation once and for all because new information might well require a revision of the original order by the district court. The possible likelihood of successive appeals on the same issue, a concern which lies at the heart of the final judgment rule, exists.

[250] See text at note 165 *supra*.

[251] See text at note 235 *supra*.

tinue to argue the matter.[252] Further, the expenses involved in defending a class action grow directly out of the concept underlying this type of suit: they are not unique to a suit being brought by a group of small claimants,[253] and therefore cannot be classified as irreparable injury or substantial harm.

Finally, an order granting class status may satisfy the three elements of section 1292(b), and receive interlocutory appellate review.[254] The first, whether the issue is novel, presents little difficulty; even though Rule 23 has been law for a decade, its contours remain relatively undefined.[255] Therefore, issues involved in granting class status can be certified to the circuit court as novel. Nor is there any doubt that the second test, whether an appeal would materially advance the litigation, will usually be satisfied, since a reversal of the order would likely terminate the action.[256] It is the third criterion, whether the order involves a controlling question of law, which is not so easily answered, and it is in answering this question that the trial judge will probably most often exercise his or her discretion. Therefore, it is this criterion which will likely control appealability of an order granting class status under section 1292(b), and it is thus this criterion which will most concern the district judge who is faced with a motion for a section 1292(b) interlocutory appeal.

Still, the grant or denial of class status is not completely within the discretion of the district court, for there is the objective, statutory framework of Rule 23 to apply.[257] Thus, in determining whether an issue involves a controlling question of law, a judge should not be too concerned with the question of whether an order is purely discretionary or purely non-discretionary, appealable or not. Rather, the focus of the examination should be on the case as a whole, to see if the order, if left unchanged, might result in extended and extensive litigation. If so, then the order would fall within the parameters of section 1292(b). As the Third Circuit has stated in *Katz* v. *Carte Blanche Corp.*:[258] "The key consideration is not whether the order involves the

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[252] *Blackie*, 524 F.2d at 897.

[253] See text at notes 238-41 *supra*.

[254] 28 U.S.C. § 1292(b). See text at notes 48-60 *supra*.

[255] *See, e.g.*, Parkinson v. April Indus., Inc., 520 F.2d 650, 655 (2d Cir. 1975).

[256] Katz v. Carte Blanche Corp., 496 F.2d 747, 754-55 (3d Cir. 1975).

[257] Note, 70 COLUM. L. REV. 1292, 1295 (1970). *See*, Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

[258] 496 F.2d 747 (3d Cir. 1974) (en banc). In *Katz*, an order granting class status was reviewed under § 1292(b). Plaintiff had sued a national credit card company for violation of the Truth in Lending Act, 15 U.S.C. §§ 1601-1681t (1970). Class status was granted, and the district court certified a § 1292(b) appeal. 53 F.R.D. 539, 547 (W.D. Pa. 1971). The circuit court believed that a section 1292(b) appeal of this order was mandated by the primary aims of that section, which were to remedy the dissatisfaction with needlessly extended litigation, and to cure the uncorrectable harm which sometimes results from a harsh use of the final judgment rule. 496 F.2d at 753. As the Third Circuit concluded: "In this case, . . . there exists by virtue of the order appealed from both the possibility of prejudice to a party pendente lite and the possibility of considerable avoidable wasted trial time and litigation expense." *Id.* at 756.

exercise of discretion, but whether it truly implicates the policy favoring interlocutory appeal."[259] The manner in which the judiciary has thus far applied section 1292(b) suggests that this type of overview is the preferred test of appealability.[260] Thus, when one focuses on the course a case is likely to follow, the question whether a certification order will produce burdensome costs of time and money, is susceptible to resolution. If the district judge decides that an unnecessarily extended and costly trial will be avoided if a disputed ruling is reversed, then section 1292(b) will be triggered and the judge may certify the order for appeal, regardless of whether some discretion is involved.

It would further seem that, although sections 1291 and 1292(b) are complementary, in that each mechanism is designed to cover a distinct class of orders, a particular order may possess characteristics of both.[261] Use of one mechanism of appeal over another will then depend upon the exigencies of the case. This overlap of the two sections was suggested by the Supreme Court in *Gillespie*. Although accepting a section 1291 appeal, the Court noted that the appeal could properly have been brought under section 1292(b).[262] However, as the order was fundamental to the further conduct of the case, the circuit court acted correctly in allowing a section 1291 appeal, for it "properly implemented the same policy congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under . . . § 1291."[263] A prerequisite to this proposition seems to have been the "fundamental" nature of the order; without an immediate appeal as of right, the case would have gone no further. Arguably, an order granting class status is not "fundamental" in this sense. The litigation will likely proceed; each party will be fully able to present its case and to rebut the other's. It is suggested, then, that a certification order is susceptible to definition as non-final, and does not present a situation where the congressionally approved method of appeal must be avoided by judicial legislation. This is particularly the case when one considers the present congestion in the federal court system, for the reverse death knell rule often results in excessive litigation of the question of jurisdiction *to hear* section 1291 appeals. A firm principle of non-appealability would alleviate these appeals, and leave the circuit courts free to consider discretionary appeals.[264]

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[259] 496 F.2d at 756.

[260] *E.g.*, Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336 (10th Cir. 1972); Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973), *noted*, Comment, 16 B.C. IND. & COM. L. REV. 609 (1975); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (a § 1292(b) appeal where the grant of class status was reviewed and reversed); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[261] See text at notes 76-78 *supra*.

[262] *Gillespie*, 379 U.S. at 154.

[263] *Id.*

[264] Some idea of the time and expense involved in the area of appealing a certification order might be gained upon considering that, after extensive research, only one case has been found in which an immediate appeal of an order designating a class has

An argument could be made that an obdurate judge might refuse to certify for appeal an order that had just been entered,[265] and that if the reverse death knell doctrine is vitiated, there will be no review of an order granting class status. Therefore, without the option of a section 1291 appeal, the defendant might suffer irreparable harm. Such a contention glosses over the fact that the defendant does not lose rights, since his claims may either be preserved or will merge in a final judgment favorable to the defendant. Since there is no indication that the district courts will be reluctant to certify appeals, this argument provides a tenuous basis for refusing to recognize section 1292(b) as the legislatively approved method of appeal.[266] Additionally, even if there is a claim of abuse at the district level, there remains the remedy of mandamus, through which the defendant may present his claim to the circuit court and seek to compel the certification of the appeal.[267]

A strong argument can thus be made that section 1292(b) is the preferred method of appealing certification orders.[268] The very availability of the remedy indicates a congressional belief that a limited intrusion into the rule of finality is required to provide for those exceptional cases where a defendant might suffer harm.[269] In view of this policy, the courts should be slow to create remedies for the same in-

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been allowed, Herbst v. International Tel. & Tel., 495 F.2d 1308 (2d Cir. 1974). A blanket rule against § 1291 appeals of orders allowing a case to proceed as a class action would have prevented wasteful appeals.

[265] *See*, Note, 70 COLUM. L. REV. 1292, 1296 (1970).

[266] As the court commented in Hackett v. General Host Corp., 455 F.2d 618, 624 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972):

> We have had no indication that the district courts of this circuit will reject applications under § 1292(b) or Rule 54(b), arbitrarily or in disregard of the policy considerations favoring, where feasible, consumer class actions warranted by federal statutes. If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus.

[267] *Id.* The court suggested that the remedy of mandamus has been used more frequently since *Cohen*. *Id.* at n.10. Mandamus is, besides a check on judicial misbehavior, a mechanism for promoting even administration of justice. La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957); 9 MOORE, ¶ 110.28 at 312. *See* Interpace Corp. v. City of Philadelphia, 438 F.2d 401 (3d Cir. 1971) (mandamus sought, unsuccessfully, to challenge a class certification order).

[268] A proposition with which the Second Circuit seems more and more willing to agree. *See* Parkinson v. April Indus., Inc., 520 F.2d 650, 656 n.5 (2d Cir. 1975). *Cf.*, *In re* Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975), where the court, noting the position advocated by Judge Friendly, and that taken by the Third, Seventh, Eighth, and Ninth Circuits (that certification orders should never be appealable under § 1291) stated: "The precedents in our circuit require us, however, to apply a three-pronged test which permits appeal from such orders in a narrow range of circumstances." *Id.* at 10 n.8. The court went on to find that the test had not been met, so that the result would have been the same, regardless of whether the test was that of Judge Friendly, or that of previous Second Circuit cases.

[269] It should be recalled that Congress particularly intended § 1292(b) to provide for those situations where non-final orders are entered in a plaintiff's favor. *See* S. REP. NO. 2434, 86th Cong., 2d Sess., U.S. CODE CONG. & ADMIN. NEWS, at 5256 (1958); text at note 104 *supra*.

jury; any further intrusion into the final order rule should initiate in Congress. At present, there are two methods of appealing orders involving controlling questions of law which, if reviewed, might obviate needlessly extended and expensive litigation: one is statutory—section 1292(b); and the other is judicial—the reverse death knell doctrine. There is thus an excess of remedies, a problem which may be resolved simply: the judicially created exception to the rule of finality should defer to the legislatively approved method of appealing interlocutory orders.

CONCLUSION

Since the inception of our judicial system, the courts have recognized that an unyielding adherence to the rule of finality will often visit unnecessary hardship on certain claimants. Certain exceptions to the final order rule were therefore defined, resulting in the treatment of orders which were otherwise interlocutory as final and thus appealable by right under section 1291. More recently, with the increase in class litigation, the death knell doctrine, aimed at allowing the suits of small claimants to continue, was engrafted onto the existing exceptions to section 1291. The logic supporting this relatively new doctrine fits well within the framework which supports the approved exceptions to finality. Even more recently, however, the reverse death knell doctrine has appeared. The question presented by this doctrine, whether orders granting class status should be considered final and appealable by right under section 1291, or interlocutory, and appealable only at the discretion of both district and circuit courts under section 1292(b) has not received uniform acceptance among the circuits. It would appear that the reverse death knell doctrine does not fall within the traditional framework of judicial exceptions and therefore represents an intrusion into the established rule of finality. Section 1292(b) appeals, however, do not intrude impermissibly into the final order rule, since such appeals do not lie as of right but are subject to judicial discretion. The reverse death knell doctrine was created to remedy the injury which Congress intended to alleviate through section 1292(b). There is no need for both, and the judicially created doctrine should be displaced by the exercise of legislative prerogative. Appeal of certification orders should therefore be brought only under section 1292(b).

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